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No. 07-1122

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

LEMON MONTREA JOHNSON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Arizona

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an officer may conduct a protective search of a passenger in a car stopped for a minor traffic infraction even though the officer lacks reasonable suspicion that the individual is committing or has committed a crime and the search cannot be justified by the officer's need to take immediate command of the scene of the traffic stop, if the officer reasonably suspects that the individual might present a safety threat.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Arizona Court of Appeals (Pet. App. A1-A23) is reported at 170 P.3d 667. The Arizona Supreme Court's order denying review (Pet. App. B1-B2) and the opinion of the trial court (J.A. 73-77) are unreported.

JURISDICTION

The Arizona Supreme Court denied review on November 29, 2007. Pet. App. B1. A timely petition for a writ of certiorari was filed on Feb. 27, 2008, and was granted on June 23, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution of the United States reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This Court has long recognized that the protections afforded by the Fourth Amendment allow police officers to act reasonably to protect themselves against the threats they encounter. In particular, the Court held in *Terry* v. *Ohio*, 392 U.S. 1 (1968), that an officer may subject an individual to a protective search for weapons if the facts known to the officer

justify a reasonable suspicion of criminal activity and a reasonable suspicion of a threat to safety. The Court also has recognized that officers are entitled to take "command over the situation" in which a permissible search or seizure is occurring. *E.g.*, *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981). That principle carries limited authority to conduct protective searches when necessary to secure the scene so that officers may conduct a permissible motor vehicle stop.

The Arizona court recognized these principles, but held that they did not justify the officer's search of Mr. Johnson because of the particular factual circumstances of this case. The court determined, based on a detailed review of the facts, that the protective search of Mr. Johnson's person occurred in the course of an encounter between the police and Mr. Johnson that "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12.

Confronted with this fact-bound determination, petitioner and its amici urge the Court to adopt a series of novel legal principles that would broadly authorize protective searches—of anyone engaged in any consensual encounter with a police officer or, alternatively, of any passenger in a vehicle stopped for a traffic violation—based solely on a reasonable suspicion of a threat to safety.

There is no warrant for such a dramatic diminution in the protection afforded by the Fourth Amendment with respect to intrusive searches of an individual's body. The concerns about officer safety emphasized by petitioner and its amici ignore the well-established principles enabling officers to act to protect themselves, principles that neither petitioner

nor its amici have shown to be inadequate. This Court should decline the invitation to use the occasion of a state court's fact-bound determination to revise dramatically Fourth Amendment jurisprudence regarding searches that touch on interests that are at the core of that constitutional protection.

A. Factual Background

On April 19, 2002, while on patrol in an unmarked vehicle, three law enforcement officers who were members of Arizona's gang task force patrolling near the Sugar Hill neighborhood of Tucson, stopped a vehicle because a license check had revealed that the registration had been suspended for an insurance-related reason, which is a civil violation under Arizona law. J.A. 7, 11-12, 29, 43-44. The stop took place at 9 p.m. on Stone Avenue, a major roadway in Tucson east of Sugar Hill that carries thousands of vehicles each day. J.A. 10-11, 30.

The officers had no reason to believe that the vehicle was involved in criminal activity, and they had received no reports of a crime committed nearby. J.A. 30, 32-33, 38-39. The civil traffic violation did not raise concerns about possible criminal behavior. J.A. 44.

Detective Machado approached the vehicle, made contact with the driver, asked the driver and two passengers to "put their hands where he can see them or put them on the front seat," and asked the driver to exit the vehicle. J.A. 14. He also asked "if there were any weapons in the vehicle, and all occupants said no." J.A. 15.

While Detective Machado was speaking with the driver,[1] Officer Trevizo initiated a conversation with respondent Lemon Johnson, a young black male who was sitting in the back seat of the vehicle. J.A. 15; Record on Appeal 7. She asked Mr. Johnson for identification; he responded that he did not have identification, but told Officer Trevizo his correct name and date of birth. J.A. 15, 19, 31. In response to further questioning, Mr. Johnson volunteered that he was from Eloy, Arizona, and that he had served time in prison for burglary. J.A. 19.

Officer Trevizo noticed that Mr. Johnson had in his pocket a scanner for listening to police calls. She testified that possession of a scanner is not illegal and that there are "plenty of people that like to listen to scanners," but stated that it was "out of the ordinary" to carry a scanner. J.A. 17. She did not observe whether the scanner was turned on. J.A. 31.

When Officer Trevizo initially observed Mr. Johnson, at the time the officers turned on their lights to stop the vehicle, she was concerned that he looked out the rear window at the officers while they approached the stopped vehicle, conduct that she deemed unusual. J.A. 12. But she found him to be "cooperative" in answering her questions and had no reason to believe he was engaged in criminal activity. J.A. 29, 39, 45.

Officer Trevizo believed that Mr. Johnson might have been a gang member because he was wearing blue, a color associated with the "Crips," a gang asso-

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[1] Officer Trevizo testified that she did not overhear any of the conversation between Detective Machado and the driver. J.A. 43.

ciated with a neighborhood near the location of the traffic stop—notwithstanding the fact that the driver was wearing red, a color linked to a rival gang—and because he had said he was from Eloy, a town that had a Crips-affiliated gang. J.A. 17-19, 27. She stated that "gang members, will often, in general, possess firearms," but did not testify specifically about members of the Crips gang. J.A. 10.

The officer "wanted to gather intelligence about the gang he might be in. * * * So I wanted to speak with him away from the other occupant that was still remaining inside the vehicle." J.A. 19; see also J.A. 20, 33. Officer Trevizo acknowledged that her questioning was not related to the purpose of the vehicle stop. J.A. 19-20, 26.

Officer Trevizo accordingly asked Mr. Johnson to exit the vehicle. J.A. 19-20, 33. She testified that Mr. Johnson "certainly" could have refused to get out of the car and that she was not planning to detain him. J.A. 41-42. She also stated that she had not provided him with *Miranda* warnings because "it was not an in-custody situation." J.A. 45.

When Mr. Johnson exited the car, Officer Trevizo directed him to turn around and told him that she was going to search him for weapons. She did not ask his permission to do so. J.A. 23, 33-36. During the initial search, she found a gun; a subsequent search of Mr. Johnson revealed marijuana. J.A. 24, 35; Pet. App. A5.

Mr. Johnson "left the vehicle in a normal manner," making no swift or furtive movements. Pet. App. A5; see also J.A. 33. Officer Trevizo "did not tell Johnson she planned to pat him down before he got out of the vehicle but 'made the decision' when he ex-

ited the vehicle." Pet. App. A5; see also J.A. 23. She stated that she "patted him down for officer safety," because she believed he might be in possession of a weapon because of his lack of identification, his possession of the scanner, her suspicion of his possible gang affiliation, his criminal record, and the fact that he watched the officers as they approached the vehicle. J.A. 20-21.

B. Decisions Below

Johnson was charged with possession of a weapon and possession of marijuana. He moved to suppress the evidence found in Officer Trevizo's search on two grounds. He argued that Officer Trevizo had no authority to conduct the protective search both because she lacked reasonable suspicion of criminal activity and because the facts did not support a reasonable belief that Mr. Johnson was armed and dangerous. J.A. 57-58; Motion to Suppress filed Oct. 31, 2005, at 5-6.

The trial court denied the suppression motion. J.A.73-77. It held that "under the circumstances there was a reasonable basis to believe there was a danger, and a stop allowed them to go ahead and do the pat down." *Id*. at 77.

The court determined that "[w]hat we basically have here is a legitimate stop for what turns out to be a civil matter." J.A. 75. It concluded that there were several factors "that the police officer knew and was concerned about and increased the safety kind of issue." *Ibid*. These included the car stop, "the gang colors and this officer knowing about the gang kinds of situations," the fact that Johnson was from Eloy, his possession of the scanner, lack of identification, and prior incarceration. J.A. 76.

Johnson subsequently was convicted at trial on the two possession charges.[2]

The court of appeals reversed by a divided vote, holding that the search violated the Fourth Amendment because it occurred during a consensual encounter and was not supported by a reasonable suspicion of criminal activity. Pet. App. A1-A23.

The court held that "[a]n officer may not * * * conduct a pat-down search during a consensual encounter if the officer lacks reasonable suspicion that criminal activity is occurring, even if the officer has reason to suspect that a suspect may be armed and dangerous." Pet. App. A6. The court pointed to the fact that "a person is allowed to disregard or flee from a consensual encounter with law enforcement officers," stating that "it would be inconsistent with this idea if the 'officer possesse[d] the authority to require the target of the consensual inquiry to submit to a pat-down search.'" *Id*. at A7, A8.

The court below also quoted Justice Harlan's concurring opinion in *Terry*, stating that "'[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence.'" Pet. App. A8 (quoting 392 U.S. at 32-33).

The court of appeals first addressed the question whether Johnson was lawfully seized at the time of the pat-down search. Relying on this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007),

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[2] Johnson was acquitted of a charge of resisting arrest. Pet App. A5.

holding that a passenger is seized when the vehicle in which he is riding is lawfully stopped by the police, the court determined that "Johnson was seized when the officers stopped the car." Pet. App. A9.

Recognizing that a seizure during a traffic stop may "evolve into a consensual encounter," the court stated that

> common sense suggests that at some point during the encounter the passengers in the vehicle must be free to leave—their fate is not entirely tied to that of the driver. Obviously, if a driver is arrested and taken to the police station, innocent passengers will not also be taken into custody or required to accompany the driver. If the passengers are told they are free to leave and do so, it is clear they are no longer seized; it is equally clear that, if they are being questioned about the reason for the stop, they remain seized. It is less clear when passengers' seizures terminate under factual situations that lie within the extremes of these examples, but we must be guided by reasonableness.

Pet. App. A9, A10. "'Whether a person has been seized by police is a mixed question of law and fact.'" *Id*. at A11 (citation omitted).

Examining the facts of this case, the court determined that the "initial lawful seizure of Johnson incident to the traffic stop of the driver evolved into a separate, consensual encounter stemming from an unrelated investigation by Trevizo of Johnson's possible gang affiliation and that, under the circumstances of this case, a reasonable person in Johnson's position would have felt free to remain in the vehi-

cle." Pet. App. A14. It determined that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter was anything other than consensual." *Id.* at A12; see also *id.* at A11 (noting that Officer Trevizo "conceded that, as far as she was concerned, Johnson 'certainly' 'could have refused' her request to get out of the car").

The court held that the suppression motion should have been granted, because "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purposes of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A15, A16 (quoting *Terry*, 392 U.S. at 30).

The court emphasized the narrowness of its holding, making clear that it did not reach "the broader question * * * whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous. Had the officers immediately ordered Johnson out of the vehicle and conducted a pat-down search for the purpose of assuring their safety during the stop of the driver, that question would be presented." Pet. App. A15.

Judge Espinosa dissented. He concluded that the encounter between Officer Trevizo and Johnson was not consensual and that the officer's belief that Johnson was dangerous permitted the pat down. Pet. App. A21, A22.

SUMMARY OF ARGUMENT

The issue in this case is whether the Court should revise existing principles addressing the balance under the Fourth Amendment of two important interests—enabling law enforcement officers to protect themselves against the threats they face in the course of their duties and protecting citizens against unjustified "serious intrusion[s] on the sanctity of the person" (*Terry*, 392 U.S. at 17) through searches to discover whether an individual has a weapon concealed on his or her body. Arguing that existing standards give police officers insufficient authority to protect themselves, petitioner and its amici advance new principles more broadly permitting these searches.

The Court addressed this issue in *Terry*, holding that an officer may conduct a protective search if he is aware of facts "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30 (emphasis added). More recently, the Court has recognized that law enforcement officers may exercise authority over individuals in order to obtain "command of the situation" where a permissible search or seizure is occurring. *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981). This established principle allows protective searches necessary to secure the scene of a lawful traffic stop based on a reasonable suspicion that a passenger is armed and dangerous.

Petitioner and its amici point out that law enforcement officers face significant risks, especially in the context of vehicle stops. But they never explain why these existing principles are not sufficient to en-

able officers to protect themselves. Indeed, the facts of the lower court cases on which petitioner and the amici rely make clear that the protective searches challenged in those cases would be upheld under these existing principles. See pages 21-22 & note 6, *infra*.

The series of new standards proposed by petitioner and the amici, moreover, would effect a very substantial reduction in the protection afforded to privacy interests at the core of the Fourth Amendment. *First*, they argue that an officer engaged in any interaction with a citizen—even a casual conversation with a pedestrian on the street—may perform a weapons search based solely on reasonable suspicion that the individual is a threat to safety. The Solicitor General claims that this standard is authorized by *Terry* itself, but a review of that decision leads to the unsurprising conclusion that the *Terry* Court meant what it said: both reasonable suspicion of criminal activity and reasonable suspicion of a threat to safety are required for a valid protective search. The Court's descriptions of *Terry* in subsequent opinions confirm that conclusion.

Neither is there any basis for revising the standard adopted in *Terry*. None of this Court's Fourth Amendment precedents provide grounds for eliminating the requirement of reasonable suspicion of criminal activity as a predicate for protective searches in consensual encounters. More fundamentally, the balance between the relevant Fourth Amendment interests does not support that approach. The interest in protecting officer safety is substantial, but it also is addressed by existing standards permitting protective searches; there is little evidence that incremental authority is needed. And

the interest in preventing unjustified protective searches is substantial, because of their very significant intrusion on an individual's privacy interests.

Second, petitioner and its amici urge the Court to adopt a rule permitting protective searches of a passenger on reasonable suspicion of a threat to safety for the entire duration of every vehicle stop. But the Court consistently has refused to adopt such across-the-board standards. Holding that "the 'touchstone of the Fourth Amendment is reasonableness,'" the Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). That same approach is appropriate here.

Under *Summers* and its progeny, officers may subject a vehicle passenger to a protective search on reasonable suspicion of a threat to safety in connection with the officers' need to secure the scene of the search. The latter requirement necessitates a fact-specific inquiry, because vehicle stops arise in numerous contexts—the officers' need to control vehicle passengers will differ depending upon whether the stop occurs in the downtown area of a city or on an interstate highway—and the facts regarding the officers' interaction with the passengers will vary in every case.

An across-the-board rule would expand significantly the extent to which passengers not suspected of any criminal activity may be subjected to these searches, without any demonstration that this additional authority is needed to protect officer safety. After all, even when the *Summers* rationale does not apply, officers still may conduct such searches under *Terry*. The result of the broad new rule that peti-

tioner seeks will be the use of the protective search rationale in the context of investigations of unrelated activity—precisely what the Arizona court found occurred here.

Petitioner and its amici also invoke this Court's decision in *Brendlin*, arguing that a passenger is seized for the entire duration of a vehicle stop and that a protective search therefore may be based solely on suspicion of a threat to safety. *Brendlin* found the passenger seized at the outset of the vehicle stop; it did not hold that a passenger necessarily is seized for the entire stop, no matter how long it lasts and no matter what the circumstances. Indeed, by applying the general standard set forth in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), for determining whether an encounter is consensual, the *Brendlin* Court recognized that question turns upon the facts of the particular stop. Again, there is no justification for replacing the Fourth Amendment's general fact-based standard with an across-the-board rule that will as a practical matter open the door to intrusive searches based on a significantly reduced factual justification.

The Arizona court below applied this Court's precedents, closely analyzed the factual record, and concluded that the interaction between Officer Trevizo and Mr. Johnson "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12. There is no basis for reconsideration of that fact-bound determination by this Court.

Even if the Court concludes, contrary to our submission, that the search here may be upheld if the officer had only a reasonable suspicion that Mr. Johnson was armed and dangerous, the judgment of

the court of appeals should not be reversed because the facts here do not satisfy that standard. The Court should remand the case to allow the Arizona court to address in the first instance the sufficiency of the facts.

Moreover, the facts are plainly insufficient to satisfy that standard. Officer Trevizo did not cite any of the factors that courts typically rely upon to establish a reasonable suspicion of a sufficient threat to safety. Rather, she invoked generic observations that could apply to a very substantial number of unarmed individuals and therefore do not provide a sufficiently focused level of suspicion to uphold these intrusive searches under the Fourth Amendment.

ARGUMENT

THE SEARCH OF MR. JOHNSON VIOLATED THE FOURTH AMENDMENT.

Petitioner and its amici attempt to frame their position as a routine application of this Court's decisions, but they actually seek an unprecedented reduction in the protection afforded by the Fourth Amendment. Put simply, they contend that the police may search anyone with whom they interact—even a pedestrian engaged by an officer in an entirely consensual encounter—based on a reasonable suspicion that the individual may be armed and dangerous.

Thus, the Solicitor General asserts (Br. 7) that a protective search should be permissible "whenever an individual chooses * * * to remain in the presence of an officer, in a place where the officer has the lawful right to be"—a test that would permit these searches in any public place at any time. And if the individual sought to avoid search by leaving the presence of the police, that "flight" would be used to

justify a search under the *Terry* standard. The practical effect would be to expand dramatically the power to undertake searches of individuals' persons.

This Court has never upheld such a search on the basis of the minimalist standard urged by petitioner and its amici. To the contrary, this Court's precedents, beginning with *Terry*, recognize that a protective search is a "serious intrusion on the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." 392 U.S. at 17.

The Court accordingly has required two factual predicates for an officer's protective search to comport with the Fourth Amendment: the officer must be aware of facts "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30 (emphasis added); accord *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972).

Both elements have been present in each of the cases in which this Court has upheld a protective search. *Adams*, 407 U.S. at 147; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). See also *Michigan* v. *Long*, 463 U.S. 1032 (1983) (suspicion of driving while intoxicated); *United States* v. *Robinson*, 414 U.S. 218 (1973) (search incident to arrest).

Dispensing with the requirement that the officer reasonably suspect that "criminal activity may be afoot" for all encounters between officers and the public—as petitioner and its amici urge—would dramatically reduce the protection afforded by the Fourth Amendment. Because an officer may ap-

proach anyone to initiate a consensual encounter, and courts may be reluctant to second-guess an officer's conclusion that she reasonably believed an individual to be armed and dangerous even when the factual basis for that belief is weak, the practical effect of petitioner's new rule would be to empower officers to target individuals for search based on "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. In other words, to authorize the random searches that the framers of the Fourth Amendment sought specifically to prohibit.

We first explain that this dramatic constriction of Fourth Amendment protection cannot be justified by the need to protect officer safety, because well-established principles already address that concern. Next, we demonstrate that in the context of a consensual encounter, a search for weapons is permissible only when *Terry*'s standard is satisfied—the officer must reasonably suspect that the individual is engaging in or has engaged in criminal activity and that the individual is armed and dangerous. Because Officer Trevizo and Mr. Johnson were engaged in a consensual encounter at the time of the search at issue here, and Officer Trevizo could not exercise control over Mr. Johnson, that standard applies in assessing the search under the Fourth Amendment.

A. Settled Fourth Amendment Principles Allow Officers Broad Leeway To Protect Themselves Against Attacks By Individuals With Whom They Interact.

Every member of society has a strong interest in ensuring that the law enforcement officers who protect us may take all reasonable and appropriate steps to protect themselves from harm as they go about their duties. "[I]t would be unreasonable to re-

quire that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23; accord, *Adams*, 407 U.S. at 146.

To vindicate this important interest, long-established Fourth Amendment principles recognize law enforcement officers' broad authority to conduct protective searches.[3]

First, the Court's holding in *Terry* permits protective searches in the overwhelming majority of situations in which an officer is threatened with harm. If facts known to the officer truly justify a reasonable belief that the individual is armed and dangerous, those same facts will in the vast majority of cases also justify a reasonable belief that "criminal activity is afoot." That is because when "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" (*Terry*, 392 U.S. at 27), he virtually always would also be justified in believing that the individual was engaging in criminal activity.

Indeed, threatening harm to law enforcement personnel or to the public constitutes a crime in virtually every jurisdiction. *E.g.*, Cal. Penal Code §§ 69 & 422 (threats of violence and threats interfering with law enforcement officers); N.J. Stat. Ann. § 2C:12-1(a)(3) & § 2C:12-1(b)(5)(a) (menacing); N.Y.

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[3] The Court also has recognized that the Fourth Amendment permits law enforcement officers to take other steps to address threats to public safety. See, *e.g.*, *Scott* v. *Harris*, 127 S.Ct. 1769 (2007) (measures taken to stop suspect's reckless driving); *Brigham City* v. *Stuart*, 547 U.S. 398 (2006) (warrantless entry of home justified by observations of ongoing violence inside); *New York* v. *Quarles*, 467 U.S. 649 (1984) (establishing public safety exception to *Miranda* requirement).

Penal Law §§ 120.15 & 120.18 (placing or attempting to place police officer or placing another person in reasonable fear of physical injury); Ohio Rev. Code Ann. § 2903.22 (causing another to believe the offender will cause physical harm to the person); Tex. Penal Code Ann. § 22.01(a)(2) (intentional or knowing threat of imminent bodily injury). A reasonable suspicion that an individual is both armed and dangerous to an officer or the public therefore will in many cases be sufficient to establish a reasonable suspicion of criminal activity. *E.g.*, *United States* v. *Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006).

The converse is also true: the facts indicating that criminal activity is afoot often will support a reasonable belief that a suspect is armed and dangerous. See, *e.g.*, *Terry*, 392 U.S. at 28 (reasonable officer safety concerns premised solely on reasonable suspicion that suspect was casing store for armed robbery); *United States* v. *Bullock*, 510 F.3d 342, 346 (D.C. Cir. 2007) (reasonable suspicion of any "violent or serious crime" supports inference that "the suspect 'may be armed and presently dangerous'"), cert. denied, 128 S.Ct. 2095 (2008); *United States* v. *Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (protective search permissible when officer has reasonable suspicion that illegal drugs are present in stopped vehicle because "guns often accompany drugs"); *United States* v. *Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (same); *United States* v. *Oates*, 560 F.2d 45, 62 (2d Cir. 1977) ("[T]he belief of the police officer that the suspect may be armed and dangerous can be predicated on the nature of the criminal activity involved."); *People* v. *Franklin*, 217 Cal. Rptr. 529, 534-535 (Cal. Ct. App. 1985) (protective search justified after traffic

stop on the basis of reasonable suspicion that occupants were perpetrators of recent armed robbery).[4]

Second, the Court has recognized in several contexts that law enforcement officers may exercise authority over individuals in order to obtain "command of the situation" where a permissible search or seizure is occurring. *Summers*, 452 U.S. at 703. The question in *Summers* was whether officers could detain an individual leaving a house as they arrived to execute a warrant there. The Court pointed out that the execution of a warrant "is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence" and that the risk of harm would be "minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703.

In upholding the seizure, the Court emphasized that

> [a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself.

Summers, 452 U.S. at 701; see also *Muehler* v. *Mena*, 544 U.S. 93, 98-99 (2005) (upholding detention of oc-

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[4] In addition, of course, an officer may conduct a search incident to arrest when she has probable cause to arrest an individual. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1607 (2008); *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973).

cupants of premises being searched pursuant to a warrant as well as "use of reasonable force to effectuate the detention").

Law enforcement officers' authority to exercise control over individuals found in a house being searched carries with it the ability to protect themselves against such individuals. The Court made clear in *Los Angeles County* v. *Rettele*, 127 S. Ct. 1989, 1992-1993 (2007) (per curiam), that officers executing a search warrant may perform a protective search of an individual found in the location named in the warrant if the officers have reasonable suspicion that the individual may be armed and dangerous.

The Court relied on *Summers*' analysis in *Maryland* v. *Wilson*, 519 U.S. 408, 414-415 (1997), holding that a police officer at the outset of a vehicle stop could order passengers out of the car in order to take "command of the situation" and minimize the risks of violence or injury to the officers as well as to the passengers.

The lower courts have extended *Wilson*, holding that at the point that *Wilson* permits an officer to exercise control over vehicle passengers, the officer may conduct a weapons search based on reasonable suspicion that a passenger is armed and dangerous. See, *e.g.*, *United States* v. *Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (officers acted at the outset to secure the scene); see also page 22 & note 6, *infra* (citing cases).[5]

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[5] This Court appeared to recognize this authority in dicta in its opinion in *Knowles* v. *Iowa*, 525 U.S. 113 (1998). See page 42, *infra*.

Law enforcement officers' authority under *Summers* and *Wilson* to exercise control over individuals in order to take "command of the situation" does not last indefinitely. The Court's decisions make clear that the duration of the officer's authority turns upon the underlying purpose. "[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005). In *Caballes*, which involved a traffic stop for speeding, the Court observed that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Ibid.*; cf. *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985) (length of permissible investigative stop determined by objective reasonableness of officer's investigatory conduct).

In the context of execution of a search warrant, as in *Summers*, the officers may detain an individual for the duration of the search because the detention is related to effectuation of the search authorized by an independent magistrate, including enabling officers to obtain access to the places authorized to be searched. 452 U.S. at 702-703; *Muehler*, 544 at 99 n.2.

Officers' authority over passengers during a vehicle stop stems from the interest in enabling them to secure the scene so that they may engage in their investigatory activities. *Wilson*, 519 U.S. at 414-415. Once that is accomplished, the officers' authority to control these individuals expires. That is why the decisions cited by petitioner (Br. 14-15 n.2 & 22-23 n.3) and its amici (*e.g.*, U.S. Am. Br. 13-14 n.4) upholding

protective searches of passengers on this basis virtually all involve searches that occurred in the context of law enforcement officers' efforts to secure the scene.[6]

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[6] *E.g.*, *United States* v. *Soares*, 521 F.3d 117, 118-119 (1st Cir. 2008) (from the commencement of the stop, individual was agitated and verbally abuse and impeded officers' control of the scene); *United States* v. *Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (officers acted at the outset to secure the scene);*United States* v. *Colin*, 928 F.2d 676 (5th Cir. 1991) (same); *United States* v. *Fryer*, 974 F.2d 813 (7th Cir. 1982) (same).

In many cases, the facts plainly supported reasonable suspicion of criminal activity, so the protective search would have been upheld under the *Terry* standard even if it were insufficiently related to the interest in securing the scene. *United States* v. *Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (officers had information that the passenger owned a firearm and was participating in cocaine trafficking); see also *United States* v. *Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (car's movements indicated preparation for burglary or drive-by shooting; officers knew that passenger was armed and dangerous); *Holeman* v. *City of New London*, 425 F.3d 184, 192 (2d Cir. 2005) (convicted narcotics felon acting suspiciously in high crime neighborhood); *United States* v. *Montgomery*, 377 F.3d 582 (6th Cir. 2004) (officers saw illegal drugs in the car), cert. denied, 543 U.S. 1167 (2005); *United States* v. *Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (officer recognized passenger as an associate of the driver, who the officer had arrested for a drug violation a few weeks earlier, and as a suspected manufacturer of controlled substances). See also *United States* v. *Davis*, 202 F.3d 1060, 1062 (8th Cir. 2000) (requiring proof of suspicion of criminal activity: "to be constitutionally reasonable, a protective frisk must also be based upon reasonable suspicion that criminal activity is afoot").

Still other cases are inapposite because they involve officers securing the scene to enable execution of an arrest warrant, a situation analogous to execution of the search warrant in *Summers*. *E.g.*, *United States* v. *Flett*, 806 F.2d 823 (8th Cir. 1986); *United States* v. *Vaughan*, 718 F.2d 332 (9th Cir. 1983);

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This case does not involve either of the typical factual situations involving protective searches just discussed. The State did not attempt to argue below that the relevant facts established a reasonable suspicion of criminal activity, and sought instead to justify the search solely by reference to the alleged reasonable suspicion that Mr. Johnson posed a threat to Officer Trevizo's safety. Pet. Br. 2. Given the close relationship between the two standards, the State's position casts doubt on the sufficiency of the facts to establish a reasonable suspicion of a threat to officer safety.

In addition, the State is faced with the finding by the court below that Mr. Johnson was no longer under the officer's control at the time the search took place. See pages 8-9, *supra*. It therefore must argue that a weapons search during a consensual encounter is subject to the same standard as one occurring in the course of a seizure.

There is no evidence that these unusual facts arise with any frequency. Certainly neither the certiorari petition nor the merits briefs filed by petitioner and its amici demonstrate that there are (1) a significant number of cases in which the prosecution concedes that the relevant facts suffice only to establish reasonable suspicion of a threat to officer safety; or (2) a substantial number of cases in which the lower court has held a search impermissible because the officer lacked authority to exercise control over the individual. See page 22 note 6, *supra*.

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see also *United States* v. *Dennison*, 410 F.3d 1203 (10th Cir.) (vehicle search), cert. denied, 546 U.S. 955 (2005).

Notwithstanding the absence of any indication of a gap in police officers' ability to protect themselves under settled Fourth Amendment principles, petitioner and its amici urge this Court to address the atypical facts presented here by adopting a significant new Fourth Amendment rule applicable to consensual encounters, with broad ramifications for privacy protection in a variety of contexts.

There is no justification for this dramatic change in Fourth Amendment jurisprudence. Indeed, the references of petitioner's amici to the need to protect officer safety ignore the existing principles allowing officers to exercise very broad authority to protect themselves.[7]

We next explain why petitioner and its amici are wrong in asserting that even if the encounter were consensual, the search would be permissible if the officer reasonably believed that Mr. Johnson was armed and dangerous. Rather, the legal standard governing the permissibility of the search depends upon whether the officer had the authority to control Mr. Johnson's movements at the time of the search.

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[7] As we explain below (at 34-48), the arguments advanced by petitioner and its amici turn upon whether Officer Trevizo could seize Mr. Johnson, either under the principle recognized in *Summers* and *Wilson* or under this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007). It is not at all clear that the question presented in the certiorari petition—which says nothing about either issue—brings before this Court the Arizona court's factual determination that Officer Trevizo lacked this authority.

B. A Protective Search During A Consensual Encounter Must Be Justified By A Reasonable Suspicion Of Criminal Activity As Well As A Reasonable Belief That The Suspect Is Armed And Dangerous.

An officer "is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Sibron* v. *New York*, 392 U.S. 40, 64 (1968).

The Fourth Amendment generally permits law enforcement authorities to search an individual's person only when the facts known to the officers constitute probable cause to arrest the individual. *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979). That is because the intrusion on the privacy interests protected by the Fourth Amendment is very substantial—"a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons" that is typically "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised." *Terry*, 392 U.S. at 16-17; see also pages 32-33, *infra*.

The exceptions to this general rule endorsed by this Court have been narrowly tailored to permit protective searches only in very specific situations in which there is a significant threat to the safety of law enforcement officers or the public at large. See pages 16-22, *supra*.

Petitioner and its amici argue for an extremely broad approach—that all that is required to justify

any protective search in any context is a reasonable suspicion of a threat to officer safety. Although they focus on the motor vehicle context, the legal principle they advocate would encompass all consensual encounters, including an officer's voluntary on-the-street interactions with pedestrians.[8] Such a standard is inconsistent with this Court's precedents and with the principles embodied in the Fourth Amendment.

1. **Terry *makes clear that reasonable suspicion of a threat to officer safety by itself is not sufficient to justify a protective search during a consensual encounter.***

This Court's decision in *Terry* holds that a reasonable suspicion of a threat to officer safety is not by itself sufficient to justify a protective search. The Court expressly determined that in order to conduct a protective search of an individual approached on the street, the officer must have *both* a reasonable suspicion of criminal activity *and* a reasonable suspicion of a threat to officer safety. 392 U.S. at 30. Under petitioner's approach, *Terry* should have been decided differently—the officer could have approached Mr. Terry, asked him a question, and then immediately searched him based only on reasonable suspicion of a threat to safety.

The two elements of the *Terry* standard reflect the two separate intrusions on Fourth Amendment interests that inevitably occur during a protective search. First, the individual is seized; he is under the

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[8] Indeed, petitioner relies (Br. 22-23 n.3) on decisions involving pedestrians to justify its position.

control of the officer during the time the search is conducted and deprived of "his freedom to walk away." *Terry*, 392 U.S. at 16. Second, the individual's right to prevent his person from being touched by others is intruded upon to a significant degree. See pages 32-33, *supra*. As the Court observed in *Terry*, "Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." 392 U.S. at 19.

To be sure, an individual may consent to a protective search. But a person's willingness to engage in a consensual encounter, standing on the street and answering an officer's questions—an encounter that the individual is free to terminate at any time—does not constitute consent to a seizure of his person by the officer for the purpose of conducting a protective search. Cf. *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). In the absence of consent *to the protective search*, therefore, the *Terry* standard must be satisfied in order to justify the protective search.

Justice Harlan specifically addressed this issue in his concurring opinion, confirming that an officer's ability to conduct a protective search did not extend to consensual encounters, but rather applied only when the officer had a right to seize the individual and prevent him from leaving during the protective search:

> [I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. * * * If and when a policeman

> has a right * * * to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection.

Terry, 392 U.S. at 32-33 (Harlan, J., concurring).

The Solicitor General proposes a revisionist interpretation of *Terry*, contending (Br. 17) that the Court actually decided two discrete issues—when an officer may detain an individual for investigatory purposes and when the officer may perform a protective search. As we have discussed, however, that assertion bears no relation whatever to the *Terry* Court's analysis, which makes clear that it was addressing the two intrusions on Fourth Amendment interests resulting from the protective search at issue in that case: the seizure of the individual and the search of his or her person. See also *Terry*, 392 U.S. at 10 (describing case as addressing "the power of the police to 'stop and frisk'").

Indeed, the *Terry* Court specified that its decision addressed the permissibility of the seizure only as it related to the protective search, stating that it decided "nothing * * * concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. * * * We cannot tell with any certainty * * * whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons * * *."

392 U.S. at 19 n.16. The Solicitor General is thus incorrect in asserting that *Terry* addressed the seizure issue independently of the protective search.

Finally, this Court has repeatedly stated that *Terry*'s authorization of a protective search applies in circumstances in which police officers may detain the individual on the basis of reasonable suspicion of criminal activity. *United States* v. *Place*, 462 U.S. 696, 702 n.4 (1983) (endorsing Justice Harlan's conclusion in *Terry* that "'the right to frisk * * * depends upon the reasonableness of a forcible stop to investigate a suspected crime'"); see also *Florida* v. *J.L.*, 529 U.S. 266, 272, 274 (2000); *Adams*, 407 U.S. at 146.[9] It simply is not possible to construe *Terry* to permit protective searches in connection with consensual encounters based on a lesser showing.[10]

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[9] The Solicitor General suggests (Br. 20-21) that the statements in each of these opinions are dicta because none of them involved a consensual encounter. But the critical fact is that the Court has read *Terry*'s authorization of protective searches to apply only in the context of forcible detention. His reliance (Br. 18) on *Ybarra* v. *Illinois*, *supra*, is wholly misplaced. In holding invalid under the Fourth Amendment the search at issue in that case, the *Ybarra* Court stated that *Terry* "created an exception to the requirement of probable cause, an exception whose 'narrow scope' th[e] Court 'has been careful to maintain,'" and rejected the contention that the Fourth Amendment authorizes a generalized search for weapons. 444 U.S. at 93-94.

[10] The lower courts generally have determined that even in the context of searches following a consensual encounter both prongs of the *Terry* standard must be satisfied in order to uphold a protective search. See, *e.g.*, *United States* v. *McKoy*, 428 F.3d 38, 39 (1st Cir. 2005) ("It is insufficient that the stop itself is valid; there must be a separate analysis of whether the standard for pat-frisks has been met."); *United States* v. *Hunter*, 291 F.3d 1302, 1307 (11th Cir. 2002); *United States* v. *Burton*, 228

2. The Solicitor General's expansive—and novel—protective search principle is squarely inconsistent with this Court's decisions.

Piecing together quotes from several of this Court's opinions, the Solicitor General also argues (Br. 18-21) that the Court has recognized a general principle that officers may conduct a protective search whenever they have a reasonable suspicion that an individual is armed and dangerous. No decision of this Court so holds, and the Solicitor General's proposed rule is starkly inconsistent with this Court's Fourth Amendment jurisprudence.

The decisions on which the Solicitor General relies—*Maryland* v. *Buie*, 494 U.S. 325 (1990), *Maryland* v. *Wilson*, *supra*, and *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam)—involve situations in which police officers, by virtue of their execution of a warrant or permissible stop of a vehicle, may, as the Court put it in *Summers*, exercise "unquestioned

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F.3d 524, 527-528 (4th Cir. 2000) ("an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop * * *"); *United States* v. *Gray*, 213 F.3d 998, 1000 (8th Cir. 2000) (applying *Terry* standard); *United* States v. *Ubiles*, 224 F.3d 213, 217-218 (3d Cir. 2000) ("[N]or does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect absent the reasonable suspicion required by *Terry* * * * ."). The Solicitor General (Br. 17) points to the Ninth Circuit's decision in *United States* v. *Orman*, 486 F.3d 1170 (9th Cir. 2007), cert. denied, 128 S.Ct. 1868 (2008), but *Orman* is an outlier. The second Ninth Circuit decision cited by the Solicitor General—*United States* v. *Flippin*, 924 F.2d 163 (1991)—involved the seizure of a bag, not a protective search.

command of the situation." 452 U.S. at 703; see also pages 19-22, *supra*.

Neither *Buie* nor *Wilson* even involved protective searches of an individual. *Buie* held that in connection with the execution of an arrest warrant, the officer could conduct a "cursory visual inspection of those places in which a person might be hiding" (494 U.S. at 327); and *Wilson* involved the authority to order a passenger out of a car. These decisions provide no support for the proposition that a protective search in the context of a wholly consensual encounter may be based upon a reasonable suspicion of a threat to officer safety.

The question in *Mimms* was whether an officer may order the driver of a stopped vehicle to get out of the car. The Court in *Mimms* specifically recognized that "[i]n this case, unlike *Terry v. Ohio,* there is no question about the propriety of the initial restrictions on [the individual's] freedom of movement" because he had been driving a car with expired license tags in violation of state law. 434 U.S. at 109. It concluded that the incremental intrusion on Fourth Amendment interests resulting from the order to exit the car was justified by the risk to police officers conducting traffic stops.

It is true that the individual in *Mimms* was subjected to a protective search after he exited the car. But the State did not argue that the protective search was justified solely by reasonable suspicion that the individual was armed and dangerous. Rather, it asserted that "once the driver alighted, the officer had independent reason to suspect criminal activity and present danger and it was upon this basis, and not the mere fact that respondent had committed a traffic violation, that he conducted the

search." 434 U.S. at 110 n.5. *Mimms* therefore provides no support whatever for the new rule proposed by the Solicitor General.

More fundamentally, the balance between the relevant Fourth Amendment interests does not support an across-the-board rule permitting protective searches in consensual encounters.

The interest in protecting officer safety is strong, but the weight of that interest here must be assessed by reference to the incremental protection to officer safety—above that available under current standards—that would result from the government's new rule. As we have discussed, existing precedent enables officers to protect themselves in all situations, under the *Terry* test, and to an even greater degree when justified by the need to establish control over the scene of permissible investigatory activities. Although the Solicitor General (Br. 20) points to the important interest in protecting officer safety, he does not explain the need for additional authority in this area.

On the other hand, the Court has consistently recognized the very substantial intrusion on the privacy interests protected by the Fourth Amendment that results from a search of an individual's person. "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Terry*, 392 U.S. at 9 (quoting *Union Pacific Railroad Co.* v. *Botsford*, 141 U.S. 250, 251 (1891)); see also *Wyoming* v. *Houghton*, 526 U.S. 295, 303-304 & n.1 (1999) (upholding search of passenger's belongings in vehicle; distinguishing that situation

from more intrusive search of passenger's person); *United States* v. *Di Re*, 332 U.S. 581, 586-587 (1948).

That intrusion is much greater than the effect of controlling an individual's movements, which itself intrudes significantly on Fourth Amendment interests. *Wilson*, 519 U.S. at 422 ("[w]hen an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial") (Kennedy, J., dissenting).

Given officers' ability under existing precedent to protect themselves, and the seriousness of the intrusion on Fourth Amendment interests, there is no warrant for permitting protective searches based solely on reasonable suspicion of a threat to safety. That is especially true because of the practical reality that the factual showing that courts sometimes require under this standard generally is quite limited, because of the reluctance to second-guess officers' decisions in this area.

The additional constraints upon officer discretion under existing law—whether the reasonable suspicion of criminal activity required by *Terry* or that the officer was legitimately exercising authority to "command * * * the situation" as in *Summers*, *Wilson*, and *Mimms*—provide important limitations that cabin the risk of unjustified, random intrusions on these core privacy interests while allowing officers ample leeway to protect themselves. The Solicitor General's proposal, by contrast, would open the door to the very sort of random and pretextual searches that the Fourth Amendment was adopted to prevent.

Finally, utilizing a less demanding standard to justify protective searches that occur in conjunction

with a consensual encounter will have the perverse effect of discouraging individuals from cooperating with the police. As the Solicitor General points out (Br. 22), voluntary cooperation of the citizenry is essential to effective law enforcement. Once citizens understand that consenting to conversations with a police officer would give the officer greater leeway to conduct an intrusive and embarrassing public search, it is likely that many will be deterred from interacting with the police. That will hamper crime detection and impede investigations.[11]

There simply is no basis in this Court's precedents or in Fourth Amendment principles for permitting searches based solely on a reasonable suspicion of a threat to officer safety.

C. By The Time Officer Trevizo Searched Mr. Johnson, Their Encounter Was Not Related To The Vehicle Stop And Had Become Consensual.

The Fourth Amendment standard governing the permissibility of the protective search here turns on the nature of the encounter between Officer Trevizo and Mr. Johnson at the time the search was conducted. If Officer Trevizo lacked authority over Mr. Johnson's movements, and their interaction was therefore consensual, then the search must be justified by a reasonable suspicion of criminal activity as

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[11] The Solicitor General suggests (Br. 23) that rejection of his proposed standard will "encourage those who wish to avoid any contact with the police to arm themselves to deter officers from approaching them." But the approach and protective search by the officers in *Terry* was upheld by the Court in that case, and such searches have been upheld in many subsequent cases.

well as reasonable suspicion of a threat to officer safety.

If, on the other hand, Officer Trevizo was exercising authority over Mr. Johnson in order to "secure the scene" of the traffic stop as in *Summers* and *Wilson*, then only proof of a reasonable suspicion of a threat to officer safety would be required. Because the facts here plainly establish that the encounter was unrelated to the stop and consensual, the search violated the Fourth Amendment.

*1. **The Arizona court correctly determined that the encounter was both unrelated to the stop and consensual.***

After assessing all of the relevant facts, the court below expressly determined that the interaction between Officer Trevizo and Mr. Johnson "was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12. There is no reason for this Court to second-guess that fact-bound determination.[12]

To begin with, the events here cannot be justified on the same basis as the officers' actions to "command the scene" addressed in *Summers* and *Wilson*. Although this Court has not specifically addressed the standard for determining when the facts permit officers to exercise this authority, it has made clear that the applicability of the Fourth Amendment does not turn on subjective intent. *Whren* v. *United States*, 517 U.S. 806, 813 (1996). The question here, therefore, turns on an objective assessment of the facts—whether Officer Trevizo legitimately exercised

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[12] Indeed, it is not clear that this issue is before the Court. See note 7, *supra*.

this authority over Mr. Johnson in view of the particular facts surrounding their encounter.

The court below observed that Officer Trevizo did not conduct the search, or even order Mr. Johnson out of the car, at the beginning of the vehicle stop. Pet. App. A11-A12. Officer Trevizo testified "that the traffic stop was routine and that no one in the vehicle had been suspected of criminal activity when she and the other officers made the stop." *Id.* at A12; see also J.A. 30. "Indeed, the front seat passenger remained in the car throughout the encounter. This fact lends further support to the conclusion that Trevizo's questioning of Johnson was wholly unrelated to the stop and constituted a separate, and consensual, encounter." Pet. App. A12.

Officer Trevizo herself testified that she was not exercising authority over Mr. Johnson. She stated that the reason she asked Mr. Johnson to leave the car was to speak with him "to gather intelligence about the gang that he might be in" and that the conversation likely would be more fruitful if she could "speak with him away from the other occupant that was still remaining inside the vehicle." J.A. 19. Also, "Trevizo conceded that, as far as she was concerned, Johnson 'certainly' 'could have refused' her request to get out of the car." Pet. App. A11.[13]

Thus, rather than acting to secure the scene, Officer Trevizo was conducting a "separate investigation of Johnson's possible gang affiliation, a matter

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[13] Although Officer Trevizo's intent is not dispositive of the question, it points in the same direction as the objective facts—that her actions did not in any way rest on the need to assert control over the scene of the vehicle stop.

wholly unrelated to the purpose of the traffic stop." Pet. App. A13.[14]

The Arizona court recognized that "[h]ad the officers immediately ordered Johnson out of the vehicle and conducted a pat-down search for the purpose of assuring their safety during the stop of the driver," it would be necessary to address "whether officers, in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous." Pet. App. A15. Because the facts made clear that the search was unrelated to the stop, the court did not address the issue.[15]

The court below also determined that "[n]one of Trevizo's verbal or nonverbal communications with Johnson before the pat down can reasonably be construed to have conveyed to him that his encounter with her was anything other than consensual." Pet. App. A12. The site of the vehicle stop—a heavily trafficked area near a major intersection (J.A. 10, 30, 32)—supports that conclusion because Mr. Johnson easily could have decided to leave the scene, some-

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[14] Moreover, there is no basis in the record for the statement by the dissenting judge below (Pet. App. A20) that the traffic stop was still ongoing. Officer Trevizo testified that she was not aware at the time of the nature of the interaction between the driver and the other officer. J.A. 43.

[15] As we discuss below (at pages 39-45), the Arizona court applied the correct legal standard in determining, based on the particular facts, that Officer Trevizo's invocation of "safety" was not sufficient to uphold the search under the principle recognized in *Summers* and subsequent cases. See also pages 20-22 & n.6, *supra* (discussing lower court cases).

thing that might not be true if the stop had occurred in an isolated rural area or on an interstate highway.

The Arizona court for all of these reasons concluded that the "initial lawful seizure of Johnson incident to the traffic stop of the driver evolved into a separate, consensual encounter stemming from an unrelated investigation by Trevizo of Johnson's possible gang affiliation." *Id.* at A14. It further found that "a reasonable person in Johnson's position would have felt free to remain in the vehicle." *Ibid.* "Trevizo's request that Johnson step out of the car to discuss gang activity, and not for officer safety purposes, was part of a consensual encounter." *Ibid.*

Petitioner and its amici urge this Court to overturn the court of appeals' assessment of the facts and hold that the encounter was part of an effort by Officer Trevizo to secure the scene of the stop and had not become consensual. It is not clear why they believe that this Court is better situated than the Arizona Court of Appeals to make that determination.

The Arizona court applied the correct legal standard. See Pet. App. A10-A11 (quoting *Michigan* v. *Chesternut*, 486 U.S. 567 (1988)). And it analyzed all of the relevant facts in reaching its conclusion. Cf. *United States* v. *Drayton*, 536 U.S. 194 (2002) (holding encounter consensual under much more coercive circumstances). There simply is no warrant for this Court to reach a different conclusion.[16]

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[16] The Solicitor General implies (Br. 15-16) that the Arizona court rested its decision on Officer Trevizo's subjective intent. In fact, the court recognized that her intent was relevant "'only to the extent that intent has been conveyed to the person confronted.'" Pet. App. A11-A12 (quoting *Chesternut*, 486 U.S. at

2. The Court should not adopt a special Fourth Amendment principle permitting officers to exercise control over passengers for the entire duration of a vehicle stop.

Apparently recognizing that the facts make clear that Officer Trevizo's encounter with Mr. Johnson had nothing to do with assuring safety in connection with the vehicle stop, petitioner and its amici argue for a legal rule that makes the facts irrelevant: they argue that an officer's authority over passengers lasts for the entire duration of a vehicle stop, no matter what happens during the stop. On this theory passengers in a stopped vehicle may be subject to a protective search based on reasonable suspicion of a threat to officer safety until the vehicle stop terminates.

Two justifications are advanced in support of this broad principle: *first*, that the officer's authority to "secure the scene" under the principle recognized in *Summers* and *Wilson* permits her to exercise control over passengers until the stop concludes; and *second*, that this Court's decision in *Brendlin* v. *California*, 127 S.Ct. 2400 (2007), holds that a passenger remains seized for the entire duration of the stop. Neither supports the very significant intrusion on Fourth Amendment interests that petitioner and its amici seek. Existing principles permit officers wide authority to protect themselves while giving appropriate protection to the very substantial privacy interests implicated by these searches.

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575 n.7). It concluded that her intent in fact had been communicated to Mr. Johnson. Pet. App. A12-A14.

In assessing these arguments, it is important to recognize that the passengers in a vehicle stopped for a traffic infraction are innocent bystanders. The driver is the individual suspected of violating the law. When—as in the category of cases at issue here—the officer has no basis for believing that the vehicle was involved in criminal activity, the passenger is seized simply by virtue of being in the vehicle and not because there is any basis whatever for believing that he is involved in illegal activity.

A second important consideration is the intrusiveness of a protective search. The passenger is compelled to leave the car and stand, often in a busy intersection in full view of the public, while he is touched by an officer in every part of his body. It is a "severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 392 U.S. at 24-25; see also pages 32-33, *supra*.

These factors weigh strongly in favor of limiting this authority to those situations in which it is clearly justified, especially because here—unlike in *Summers*—there is no authorization by an independent magistrate.

Petitioner and its amici focus (*e.g.*, U.S. Am. Br. 25-27; States Am. Br. 9-12) on the particular dangers to police officers in the vehicle stop context. But the Court's Fourth Amendment jurisprudence already provides substantial leeway to enable officers to protect themselves. See pages 16-22, *supra*. The question here is whether the Fourth Amendment permits officers to exercise additional, extremely broad, authority to conduct highly intrusive searches.

Finally, in interpreting the Fourth Amendment, the Court should take account of the original understanding of the scope of the Amendment's protections. As Justice Scalia has explained, the common law permitted a search incident to arrest based on probable cause. *Minnesota* v. *Dickerson*, 508 U.S. 366, 381 (1993) (concurring opinion). Even though the common law permitted a brief detention for questioning, Justice Scalia expressed skepticism that there was "any precedent for a physical search of a person thus temporarily detained for questioning" on the basis of reasonable suspicion of criminal activity. *Ibid.* He "doubt[ed] * * * whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity." *Ibid.* (emphasis in original).

That conclusion is even more applicable here, where the detention of the passenger does not rest on *any* individualized suspicion of criminal activity. To the extent such searches are permissible at all, they should be allowed only in very narrowly-defined circumstances in view of the governing historical precedent.

a. ***Authority to command the situation***

As we have discussed (see pages 19-22, *supra*), the duration of law enforcement officers' authority to "command the situation," as in *Summers*, *Wilson*, and *Mimms*, depends upon the underlying purpose. Where the detention occurs in connection with the execution of a search warrant issued by an independent magistrate, and the purpose of the detention is to enable officers to execute the warrant, the de-

tention may last for the time it takes to execute the warrant.

The Court has never addressed the duration of officers' authority over passengers in connection with vehicle stops. It did state in *Knowles* v. *Iowa*, 525 U.S. 113, 118 (1998), that officers may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry* v. *Ohio*, 392 U.S. 1 (1968)." In addition to being dicta (*Knowles* involved only the search of a vehicle and its driver, and held the searches unconstitutional), the Court's statement is unclear: by citing *Terry* it may be implying that both prongs of the *Terry* standard must be satisfied, as they were in *Mimms* (see pages 31-32, *supra*).

Moreover, the *Knowles* Court said nothing about the circumstances in which officers could exercise this authority. And in its prior decision in *Wilson* the Court expressly declined to address the question whether the officer has authority to detain a passenger for the entire duration of the traffic stop. 519 U.S. at 415 n.3. There is no warrant for adoption of an across-the-board rule permitting officers to control passengers, and therefore conduct protective searches on the basis only of reasonable suspicion of a threat to safety, for the entire duration of a vehicle stop.[17]

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[17] This question obviously is entirely different from the duration of an officer's control over the driver, who has been stopped on the basis of reasonable suspicion of unlawful conduct and who obviously must remain for the time reasonably needed to complete procedures associated with the stop. Cf. *Caballes*, 543 U.S. at 407.

The Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.'" *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996). It therefore has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ibid.*

The inquiry conducted by the Arizona court comported fully with this approach. That court assessed all of the relevant facts in determining whether the seizure and protective search occurred in connection with the officers' need to secure the scene of the search and concluded that it did not.

Such a fact-specific inquiry is necessary because the relevant facts can vary substantially depending on the circumstances of the traffic stop. Assume, for example, a vehicle stop at Pennsylvania Avenue and Twelfth Street, N.W., in downtown Washington, D.C. Once the officers secure the scene and make a determination that the passengers are not involved in the violation giving rise to the stop, what would be the basis for requiring the passengers to remain at the scene? As Justice Kennedy has observed, "[t]raffic stops, even for minor violations, can take upwards of 30 minutes." *Wilson*, 519 U.S. at 422 (dissenting opinion).

On the other hand, if a stop occurs on a highway or on a deserted road late at night, safety needs might justify detention of passengers for the entire length of the vehicle stop. And that also would be true if the passenger is involved in the violation because, for example, he is the owner of the vehicle.

Even if, contrary to our submission, the Court recognizes a bright-line rule permitting police in every case to detain passengers for the duration of a

vehicle stop, that does not mean that officers should be permitted *during that entire period* to conduct protective searches based on reasonable suspicion of a threat to safety. The purpose of such searches is to secure the scene so that the officers may conduct the vehicle stop. That argues for permitting these searches when justified by that purpose, but applying the *Terry* standard when, as in this case, the search is not related to asserting initial control over the scene. Cf. *Ybarra*, *supra* (holding impermissible under the Fourth Amendment protective searches of every patron in a bar that was the subject of a search warrant).

This conclusion is compelled by the intrusiveness of the government action. "When an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial." *Wilson*, 519 U.S. at 422 (Kennedy, J., dissenting). Subjecting an individual to a search in those circumstances multiplies significantly the intrusion on Fourth Amendment interests.

Applying the *Terry* standard to circumstances unrelated to the officers' need to secure the scene gives officers ample leeway to protect themselves and the public—after all, that standard governs encounters on crowded streets. See, *e.g.*, *Sakyi*, 160 F.3d at 169 (applying *Terry* standard to uphold search); page 22 note 6 (citing cases in which the facts known to the officer prior to the protective search satisfied both prongs of the *Terry* standard).

In addition, officers may ask an individual to leave the scene if they believe he may hamper the investigation. His unwillingness to do so could provide sufficient basis for a protective search under

Terry. Cf. *Hicks* v. *State*, 631 A.2d 6, 7-10 (Del. 1993) (pat-down justified where defendant, who approached while the officer was conducting an investigation in a high-crime area, refused to leave, engaged in furtive movements, behaved erratically, and gave evasive answers).[18]

This approach also ensures that a broad ability to engage in protective searches will not be used as a pretext for conducting an investigatory search during the vehicle stop. Here, for example, even if Officer Trevizo's suspicion was "reasonable," which we do not concede (see pages 48-53, *infra*), it was only barely so. And it is clear that her actual goal was to investigate Mr. Johnson and his possible gang affiliation.

The Court accordingly should refuse to extend the limited "control the scene" principle to encompass the entire duration of every vehicle stop and reaffirm the applicability of the fact-specific standard applied by the Arizona court.

b. ***Standard for determining whether encounter is consensual***

The Solicitor General argues (Br. 16) that the seizure of a passenger in connection with a vehicle stop may not evolve into a consensual encounter unless the officer explicitly states that the passenger

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[18] Moreover, the Solicitor General is wrong in asserting (Br. 22-23) that a reasonableness test will force officers to choose between conducting legitimate vehicle stops and protecting their safety. As we discuss in the text, if the protective search rests on the officer's need to assert control over the scene of the stop, then it may be upheld on the basis of a reasonable suspicion of a threat to safety.

is free to leave. But he does not provide any reason for applying this special rule in place of the general standard set forth in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), for determining whether an encounter is consensual.

Certainly nothing in this Court's decision in *Brendlin* justifies a departure from the *Mendenhall* approach for vehicle passengers. The *Brendlin* Court applied the *Mendenhall* standard and concluded that a passenger would not feel free to leave at the outset of a vehicle stop. 127 S.Ct. at 2405, 2410. It did not adopt a blanket rule that applies to all traffic stops no matter how long they last.

Indeed, the bright-line rule sought by petitioner and its amici closely resembles the standard the Court rejected in *Robinette*. There, the Court considered—in the context of a claim that a consent to search was voluntary—a rule "that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation." 519 U.S. at 36. The Court held that it was "unrealistic" to require such a statement and that a consent could be voluntary notwithstanding the absence of such a warning. *Id.* at 39-40.

The same conclusion applies here—an encounter between an officer and a passenger may have become consensual even though the officer did not make an express statement to that effect. The analysis, as in *Robinette* (519 U.S. at 40), depends upon an assessment of all of the relevant facts and circumstances.

In addition, if the conclusion that a passenger is "seized" for the entire duration of a vehicle stop

means that an officer may subject the passenger to a protective search based only on reasonable suspicion of a threat to safety, such an approach would have all of the flaws of the bright-line rule based on *Summers* and *Wilson* just discussed. It should be rejected for the same reasons.

One of the principal concerns animating the Court's decision in *Brendlin* was that "[h]olding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal." 127 S.Ct. at 2410 (footnote omitted). It would be ironic indeed if the shield provided to passengers in *Brendlin* were transformed into a sword subjecting them to intrusive protective searches for the entire duration of a vehicle stop based solely on reasonable suspicion of a threat to safety.

Finally, adopting the principle that a passenger automatically is seized for the duration of a traffic stop likely would hinder law enforcement efforts. Officers frequently ask passengers to consent to various types of searches during the course of a vehicle stop. The fact that the passenger is seized will be a factor weighing against finding that such a consent was voluntary when a court assesses that question in light of "'all of the circumstances.'" *Robinette*, 519 U.S. at 40. And the lengthy detentions of passengers that would result from such a rule could lead to the suppression of statements made by a passenger in response to an officer's questions on the ground that the passenger's treatment would "render[] him 'in custody' for practical purposes" and entitled him "to the full panoply of protections prescribed by *Miranda*

[v. *Arizona*, 384 U.S. 436 (1966)]." *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984)

The most appropriate way to accommodate all of the relevant interests—privacy and law enforcement—is to apply in the vehicle stop context the very same standard that apply in other contexts. Here, as the Arizona court concluded, application of that standard leads to the conclusion that the stop had evolved into a consensual encounter.

D. Even If The Search Of Mr. Johnson Could Be Upheld Solely Upon Reasonable Suspicion That He Was Armed And Dangerous, The Facts Known To The Officer Here Would Not Satisfy That Standard.

If the Court determines, contrary to our submission, that the search of Mr. Johnson was permissible even if it were supported only by a reasonable suspicion of a threat to safety, it would be necessary to assess whether the facts known to Officer Trevizo satisfied that standard.

The court of appeals expressly declined to address that issue, because it was not necessary to that court's decision. Pet. App. A14. This Court should remand the case to allow the Arizona court to make that determination in the first instance. *E.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1053 (1983).[19]

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[19] The State erroneously asserts (Pet. Br. 7) that Mr. Johnson did not raise this issue at the suppression hearing. The Motion to Suppress (at 5) clearly argued the point, Mr. Johnson raised it in the court of appeals (see Ct. App. Opening Br. 13; Ct. App. Reply Br. 1), and the court of appeals specifically reserved decision (Pet. App. A14).

In the event this Court determines that it is appropriate to decide that issue, the Court first should address the applicable legal standard. The Court in *Terry* stated that a protective search is permissible when the officer "has reason to believe that he is dealing with an armed and dangerous individual * * *. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27.

This standard is a demanding one. It requires specific facts giving rise to particularized reasonable suspicion both that the individual is "armed" and that he is "dangerous." *Terry*, 392 U.S. at 21 ("in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion"). The standard does not come close to being satisfied here.

To begin with, none of the facts typically relied upon by courts upholding protective searches are present here. Petitioner has conceded that Officer Trevizo did not possess reasonable suspicion of criminal activity, a factor typically cited in finding a reasonable suspicion of officers' safety. See pages 18-19, *supra*.

When facts establishing a reasonable suspicion of criminal activity are not present, courts require the presence of at least one of several factors providing a concrete indication that the individual might pose a danger—such as a bulge under the individual's clothing, or furtive or nervous movements indi-

cating that the individual was seeking to conceal a weapon.[20]

Officer Trevizo did not cite *any* of these factors. She did not detect a bulge under Mr. Johnson's clothing. Mr. Johnson did not make unusual or furtive movements. He did not even appear nervous. In addition, he vehicle stop did not occur in a high-crime neighborhood, close to recent criminal activity, or very late in the evening.

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[20] *E.g.*, *United States* v. *Black*, 525 F.3d 359, 365-366 (4th Cir. 2008) (frisk reasonable because noticeable bulge in person's pocket, and his refusal to remove his hand from his pocket), cert. denied, No. 07-11537, 2008 WL 2518091 (U.S. Oct. 6, 2008); *United States* v. *Raymond*, 152 F.3d 309 (4th Cir. 1998) (frisk reasonable because passenger exited car in a strange fashion, clutching his stomach); *United States* v. *Moorefield*, *supra* (frisk reasonable because of passenger's furtive hand movements and refusal to heed officer's commands); *United States* v. *Fryer*, 974 F.2d 813 (7th Cir. 1992) (frisk reasonable because of furtive movements between passenger and driver, and the late hour); see also *United States* v. *Soares*, 521 F.3d 117 (1st Cir. 2008) (pat-down of passenger justified where, while making stop in high-crime area at 1:15 a.m., officers observed him and other passengers making furtive movements and, after the stop, the passenger was verbally abusive, repeatedly ignored orders to remain still, and continually waved his arms around erratically); *United States* v. *Zollicoffer*, 951 F.2d 1291 (D.C. Cir. 1991) (pat-down of passenger in car stopped for traffic violations justified where car had appeared to be fleeing from police, passenger moved his hands under his coat in a manner suggesting he was hiding a gun, and, when passenger removed coat, officer observed bulge that appeared to be a gun); *State* v. *Horrace*, 28 P.3d 753 (Wash. 2001) (driver of vehicle stopped in late evening made pronounced movements in passenger's direction and could have concealed weapon in passenger's jacket).

Moreover, courts cite an individual's cooperation, like Mr. Johnson's here, as a factor weighing against the conclusion that the individual was armed and dangerous. *Hawkins* v. *United States*, 663 A.2d 1221, 1227 (D.C. 1995); *McCain* v. *Commonwealth*, 659 S.E.2d 512, 517 (2008); compare *United States* v. *Rice*, 483 F.3d 1079, 1081, 1084 (10th Cir. 2007) (evasiveness and eagerness to hide identity may be a sign of criminal activity or dangerousness). Indeed, Mr. Johnson's statement that he had been incarcerated for burglary is especially relevant in rebutting a reasonable suspicion of dangerousness: an individual bent on harming the police would hardly put the officer on notice by admitting to a prior criminal record.

Several facts cited by Officer Trevizo and relied upon by the State have been held irrelevant by other courts. Thus, courts take a skeptical view of claims relating to "eye contact" between the suspect and the officer, finding such "facts" too subjective to justify a search. *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1136 (9th Cir. 2000). Here, Mr. Johnson's scrutiny of the officers was understandable given their use of an unmarked car. Mr. Johnson's failure to have identification and his possession of the scanner, both of which were entirely lawful, are similarly irrelevant.[21]

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[21] Mr. Johnson's possession of the scanner might have been relevant if the scanner had been in use. But Officer Trevizo testified that she did not know whether it was turned on. J.A. 31. In that circumstance, Mr. Johnson could easily have been one of the "plenty of people that like to listen to scanners" (J.A. 17) who was taking the instrument to a friend's house or bringing it home from a repair shop.

Although known association with a gang known to carry guns may be a relevant consideration, the facts known to Officer Trevizo did not rise to the level that has been held sufficient to satisfy the standard. Compare *United States* v. *Flett*, 806 F.2d 823, 828 (8th Cir. 1986) ("known member of national motorcycle gang" that had "violent propensities"; individual was known as the gang's "enforcer" and had previous firearms charge). To the contrary, Officer Trevizo stated only that "gang members will often, in general, possess firearms" and said nothing about the Crips gang to which she asserted that Mr. Johnson might belong. J.A. 10. And Officer Trevizo's speculation that Mr. Johnson was engaged in gang activity is undercut significantly by the fact that he wore blue and the driver wore red (see pages 4-5, *supra*), because "typically, certain gangs have certain colors that they're most affiliated with." J.A. 9. Similarly, the fact that Mr. Johnson originally lived in Eloy, Arizona, is not an indicator of gang association—thousands of people live in that community and most are not gang members.

Finally, the fact that Mr. Johnson had been convicted for a nonviolent crime, burglary, also provides insufficient support for a conclusion that he was both armed and dangerous. *United States* v. *Davis*, 94 F.3d 1465, 1467, 1469 (10th Cir. 1996); *People* v. *Galvin*, 535 N.E.2d 837, 846 (Ill. 1989).

Applying the armed and dangerous standard strictly here is especially important because it would be the sole basis for allowing a very significant intrusion on protected Fourth Amendment interests of innocent passengers. That is unlike *Terry*, where the officer also must have a reasonable suspicion of criminal activity; and it is unlike the prior vehicle

stop cases in which a search was permissible only to establish control at the outset of the stop in order to investigate or process the observed motor vehicle violation.

The facts known to Officer Trevizo plainly were not sufficient to give rise to a reasonable suspicion that Mr. Johnson was armed and dangerous. They are generic observations that could apply to a very substantial number of unarmed individuals—they do not provide a basis for a sufficiently focused level of suspicion to satisfy the reasonableness standard. The protective search here therefore violated the Fourth Amendment. See, *e.g.*, *Davis*, 94 F.3d at 1469-1470 (although individual was associated with a gang and parked his car near a location known for criminal activity, court held that in the absence of a "suspicious bulge" in his pockets, or a "threatening move towards the officers" there was insufficient evidence to support a reasonable suspicion that he was carrying a firearm).

E. If This Court Reverses The Judgment Below, It Should Remand To Allow The Arizona Courts To Consider Mr. Johnson's Argument Under The Arizona Constitution.

Respondent argued in the Arizona courts that the fruits of the search should be suppressed under both the Federal Constitution and the Arizona Constitution. If the court below erred in holding that search violated the Fourth Amendment, the case should be remanded to enable the Arizona courts to consider whether the search violated the Arizona Constitution.

This Court's consistent practice in such circumstances is to reverse the state court's judgment based on an erroneous interpretation of federal law and remand for proceedings "not inconsistent with" that determination, leaving the state court free to consider state constitutional arguments not addressed in its earlier decision. See*, e.g.*, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990); *California* v. *Ramos*, 463 U.S. 992, 997 n.7 (1983) ("Of course, on remand from this Court, the state court is free to determine whether as a matter of state law" to reach the same result.). See also *Washington* v. *Recuenco*, 548 U.S. 212, 223 (2006) (Stevens, J., dissenting) ("The Washington Supreme Court can, of course, reinstate the same judgment on remand * * * because that court chooses, as a matter of state law, to adhere to its view * * * .").

Mr. Johnson appropriately raised and preserved his claims based on the Arizona Constitution. He argued before the trial court that suppression of the fruits of the search was warranted under the express right to privacy in Article II, section 8 of the Arizona Constitution. See Motion To Suppress at 1; J.A. 57. The argument was again raised in the court of appeals. See Ct. App. Opening Br. 7 (citing Ariz. Const. art. II, § 8, and *State* v. *Tykwinski*, 824 P.2d 761, 767 (Ariz. Ct. App. 1991)); Ct. App. Reply Br. 10 (citing *State* v. *Bolt*, 689 P.2d 519 (Ariz. 1984) (en banc)). The State responded to the argument (see Ct. App. Answering Br. 8-9), but the court of appeals did not find it necessary to address the issue.

This argument is reasonably grounded in the plain language of the Constitution's right to privacy and judicial decisions holding that this provision in some respects confers broader privacy protections

than the Fourth Amendment. See *Bolt*, 689 P.2d at 523-524; *Tykwinski*, *supra*; *Rasmussen* v. *Fleming*, 741 P.2d 674, 682 (Ariz. 1987) (en banc). Although the Arizona courts have to this point only applied that general principle to recognize broader protection in the context of searches of an individual's residence, nothing in their decisions precludes such a determination in the context of invasive searches of an individual's person.

If this Court does not affirm the opinion below, it therefore should remand to provide the Arizona courts the opportunity to reach potential independent state-law grounds for suppressing the fruits of the search of Mr. Johnson.

CONCLUSION

The judgment of the Arizona Court of Appeals should be affirmed.

Respectfully submitted.

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